



**LEGISLATION ADVISORY COMMITTEE**

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16 September 2011

The Chair  
Justice and Electoral Committee  
Parliament Buildings  
PO Box 18 041  
**WELLINGTON 6160**

**LEGAL ASSISTANCE (SUSTAINABILITY) AMENDMENT BILL**

**Introduction**

1. This submission is made by the Legislation Advisory Committee (LAC).
2. The LAC was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. The LAC has produced and updates the Legislation Advisory Committee Guidelines: Guidelines on the Process and Content of Legislation (LAC Guidelines) as appropriate benchmarks for legislation. The LAC Guidelines have been adopted by Cabinet.
3. The terms of reference of the LAC include:
  - (a) to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues;
  - (b) to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.

## **Inappropriate delegation of legislative power**

5. Clause 9 of the Bill adds a new section 13A to the Legal Services Act 2011. The new section provides that both new Schedule 1A and existing Schedule 2 may be amended by Order in Council on the recommendation of the Minister. Schedule 1A sets out the civil matters for which legal aid is available; Schedule 2 specifies the enactments in respect of which the Commissioner may refuse to grant legal aid to an applicant if the Commissioner considers that the grant of legal aid is not justified.
6. Section 13A therefore has the ability to significantly diminish the availability of legal aid in civil matters. The Bill contains two constraints on a Minister so acting. First, if a recommendation of the Minister to amend Schedules 1A or 2 would have the effect of excluding or restricting the grant of legal aid for any civil matter, the Minister must be satisfied that it is desirable in the interests of either or both of (a) the future viability of the legal aid scheme; or (b) the fairness of the legal aid scheme to applicants for legal aid and to the wider community. Secondly, before the Minister makes a recommendation, the Minister must consult with representatives of groups who, in the opinion of the Minister, are likely to be affected by the recommendations.
7. The LAC Guidelines are quite plain that the amendment of primary legislation by delegated legislation should only be used in *exceptional* circumstances. For instance, this may be justified if the matter requiring amendment has been included in primary legislation because of the importance to members of the public generally, but which will require regular updating. This feature is most unlikely in this instance.
8. The Committee is of the view that the important constitutional principle of non-delegation of legislative power has not been observed in this instance.
9. The LAC is however mindful of the practical difficulties which are sought to be addressed by this provision as it stands. It respectfully suggests that the Ministry might identify to the Select Committee those types of proceedings in which the Ministry considers that aid ought not to be available, or ought to be available only in some circumstances. It appears likely to the LAC that the real concern is with a range of proceedings in the Family Court, which may be under scrutiny by the Ministry. If the officials can identify to the Select Committee those proceedings for which it is considered that it is not in the public interest (or unaffordable) for aid to continue to be granted, and the Select Committee is satisfied of the merits of those arguments, those classes of proceedings could be added to a list of proceedings for which aid is not available, or alternatively, available on a discretionary basis only. All other civil proceedings could then continue to be referred to in statute law as proceedings for which aid is available.
10. We would add a further observation. If proceedings seeking parenting orders were to be excluded from availability for legal aid, it would be highly desirable to bring into force the amendments to the Care of Children and Family Proceedings Act (2008) which made better provision for counselling and mediation. If this is not done, the Family Court will likely be flooded with lay

litigants arguing about who has the right to day to day care and contact arrangements with children.

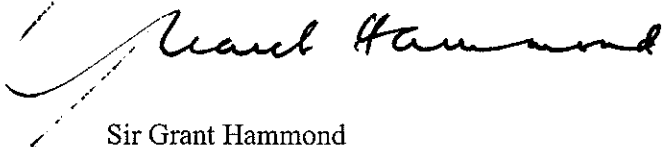
### **A vagueness problem**

11. Clause 27 adds new sections 131A-131C to the Care of Children Act 2004. In particular the new section 131A allows a court to decline to make an order against a party to require a refund of amounts paid by the Crown for appointment of a lawyer for the child if it would cause "serious hardship". "Serious hardship" does not include significant financial difficulties that arise because the party is unable to afford goods or services that are "expensive or of a high quality or standard according to normal community standards". Similar provisions are utilised in clause 46, which adds new sections to the Family Proceedings Act 1980.
12. The Committee might care to consider, as a simple example, the payment of private school fees. The question here is not only whether a person should be able to get legal aid, if refusal meant that the person had to choose between paying for their representation themselves or paying private school fees, but also who should decide that point. Is this something for Parliament to specify, or the judiciary?
13. The LAC notes the inherent difficulties in determining such issues but they will distinctly arise in practice and are not answered on the formula utilised in the Bill. To overcome the problem would require the Select Committee to give some greater shape to this vague standard, or perhaps alternatively to make provision for the provision of guidelines as to what is or is not within the formula.

### **Conclusion**

15. The Committee regards its point about inappropriate non-delegation as being of fundamental importance.
16. The other matters raised go to the improvement of the drafting of the existing Bill.
17. The Committee would like to be heard on its submission.

Yours sincerely

A handwritten signature in black ink that reads "Grant Hammond". The signature is written in a cursive style with a large initial 'G'.

Sir Grant Hammond  
Chair